FILED JULY 12, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **KENNETH MATTHEW COOKE,** **Member No. 159341,** A Member of the State Bar.	)	Case No.: **12-O-13441-LMA** **DECISION**

Introduction[1]

In this contested disciplinary proceeding, respondent Kenneth Matthew Cooke is charged with five counts of misconduct in one client matter: (1) failure to perform services competently; (2) failure to return unearned fees; (3) failure to deposit funds in client trust account; (4) failure to render accounting; and (5) failure to pay client funds.

This court finds, by clear and convincing evidence, that respondent is culpable of four counts of misconduct. In view of respondent's misconduct and the evidence in aggravation and mitigation, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of suspension be stayed, that he be placed on probation for two years and that he be actually suspended for 120 days.

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Significant Procedural History

The State Bar of California, Office of the Chief Trial Counsel (State Bar), initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on December 17, 2012. Respondent filed a response to the NDC on February 11, 2013.

A two-day trial was held on April 29 and 30, 2013. Deputy Trial Counsel Hugh G. Radigan represented the State Bar. Attorney Scott J. Drexel represented respondent. This matter was submitted on April 30, 2013.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 15, 1992, and has been a member of the State Bar of California at all times since that date.

The following findings of fact are based on the response to the NDC and the testimony and evidence presented at trial.

Facts

On November 7, 2009, Jose Maria Zarate ("Zarate") hired respondent to represent him in a marital dissolution matter. Zarate paid respondent $1,500 as advanced attorney fees in three separate installments of $500 each:

Date of Payment	*Amount*
November 7, 2009	$500
January 18, 2010	$500
February 26, 2010	$500
Total	$1,500

Zarate received a receipt from respondent's office for each payment.

On February 27, 2010, Zarate paid respondent $350 in advanced costs for court filing fees. Zarate also received a receipt from respondent's office for this payment.

On March 23, 2010, respondent filed a summons and petition for marital dissolution in *Zarate v. Zarate-Puga*, San Diego County Superior Court, case No. DS41873 (the "dissolution matter").

On March 24, 2010, Zarate paid respondent additional $100 cash in advanced costs for a process server to personally serve his wife, Melina de Jesus Zarate-Puga ("Zarate-Puga"). Zarate received a receipt from respondent's office for this payment.[2]

Respondent failed to deposit the $100 paid by Zarate as advanced costs into his client trust account at Washington Mutual, designated account number xxxxxx0875 ("client trust account").[3]

Shortly thereafter, respondent's office drafted a proposed marital settlement agreement.

Between July 2010 and March 2011, respondent's office and Zarate-Puga had ongoing discussions and negotiations about the proposed marital settlement agreement.

Respondent never personally served the summons and petition upon Zarate-Puga in the dissolution matter. Instead, on March 22, 2011, respondent mailed the summons and petition to Zarate-Puga. Zarate-Puga did not return the acknowledgment of receipt form to respondent.

On July 28, 2011, Zarate sent respondent a letter requesting his entire client file and a full refund of the $1,500 in advanced fees. In the letter, Zarate told respondent he had only received one document from respondent and no status updates on his case.

Respondent received the July 28, 2011 letter but failed to respond in writing and failed to provide an accounting to Zarate.

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[2] Respondent was not credible in his testimony that Zarate knew that he was hiring a separate process server who worked for respondent in respondent's office. Zarate was credible in testifying that he paid respondent to hire a process server to personally serve his wife. Zarate obtained a receipt from respondent's office for the $100 payment, as he had received for all the other payments to respondent's office.

[3] The complete account number is omitted due to privacy concerns.

On August 5, 2011, respondent received a faxed letter from attorney Jeremy Boyer, stating that he had been retained to represent Zarate in the dissolution matter.

On August 2, 4 and 9, 2011, respondent's office attempted to contact Zarate by telephone. They did not reach him but left voicemail for Zarate. They called Zarate on August 9 after receiving the August 5 letter from attorney Boyer.

On August 10, 2011, a substitution of counsel was filed substituting respondent out as Zarate's counsel in the dissolution matter.

On August 23, 2011, Zarate sent respondent another letter requesting a full refund of the $1,500 in advanced fees and the return of the $100 in advanced costs paid by Zarate for a process server. Respondent received the letter but again failed to respond, failed to return the $100 in advanced costs and failed to provide Zarate with an accounting.

In July 2012 (after a State Bar investigation), respondent prepared an accounting for the $1,500 in advanced fees. However, respondent sent it to an incorrect address and Zarate did not receive the accounting.[4]

On March 25, 2013, respondent attempted to refund the $100 process server fee to Zarate but was unsuccessful because Zarate had moved.[5]

On April 29, 2013, the first day of trial, respondent refunded the $100 to Zarate that Zarate paid respondent for the process server.

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[4] Zarate's address was "E" 9th Street, but respondent mistakenly addressed the mailing to "G" 9th Street. Also, Zarate had already moved from that address after hiring new attorney Boyer. Respondent could have mailed the accounting to attorney Boyer, but he did not.

[5] As previously noted, respondent could have mailed the refund to attorney Boyer, but he did not.

Conclusions

Count One - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

By failing to properly serve Zarate-Puga with the summons and complaint in the dissolution matter, respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

Count Two - (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned.

There is no clear and convincing evidence that any part of the $1,500 advanced fees paid by Zarate had not been earned. In the dissolution matter, respondent filed the petition, worked on the marital settlement agreement, and negotiated the marital settlement agreement. Thus, respondent did not violate rule 3-700(D)(2).

Count Three - (Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account])

Rule 4-100(A) provides that all funds received or held for the benefit of clients, including advances for costs and expenses, must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions.

Respondent argues that because he never received the $100, there was nothing to deposit.

On the contrary, respondent has a "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds." (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.) These duties are nondelegable. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.)

Respondent may not personally have received the cash but his office received it, as evidenced by the receipt given to Zarate. Although he may reasonably rely on his office staff to care for the client trust account, it does not relieve him from the professional responsibility to properly maintain funds in that account. Respondent has a direct professional responsibility to his client and he does not avoid that direct professional responsibility by, even reasonable, reliance on a responsible employee. (See *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 411.)

Therefore, by failing to deposit the $100 paid by Zarate as advanced costs into his client trust account, respondent failed to deposit funds received for the benefit of a client in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, in willful violation of rule 4-100(A).

Count Four - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property.

Respondent's argument that the client did not ask for an accounting but requested only a refund is without merit. The obligation to render appropriate accounts to the client does not require as a predicate that the client demand such an accounting. (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 952.)

When Zarate asked for a full refund of the fees ($1,500) in July 2011, respondent should have provided an accounting. Instead, he ignored the request. He did not prepare an accounting until a year later, after the State Bar's investigation, and even that was not received by Zarate due to respondent's mistake in the mailing address.

Thus, by failing to provide Zarate with an accounting for the $1,500 in advanced fees and $450 in advanced costs paid by Zarate, respondent failed to render appropriate accounts to a client regarding all funds coming into his possession, in willful violation of rule 4-100(B)(3).

Count Five - (Rule 4-100(B)(4) [Promptly Pay/Deliver Client Funds])

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive.

Respondent did not refund the $100 to Zarate until the day of trial and only until the State Bar provided proof of receipt.

By failing to return the $100 in advanced costs paid by Zarate, respondent failed to pay promptly, as requested by a client, any funds in respondent's possession which the client is entitled to receive, in willful violation of rule 4-100(B)(4).

Aggravation[6]

Prior Record of Discipline (Std. 1.2(b)(i).)

Respondent has a prior record of discipline. On March 7, 2013, the State Bar Court filed a decision, recommending that respondent be suspended for two years, stayed, placed on probation for two years, and actually suspended for six months and until he makes restitution to four former clients (totaling more than $2,500). His misconduct in six client matters included failure to communicate, failure to refund unearned fees, failure to provide accounting, and failure to perform services competently. The misconduct occurred during the years 2009 through 2012. (State Bar Court case Nos. 10-O-10327 et al.)

[6] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Because his misconduct in the prior case occurred contemporaneously with the current misconduct, it is appropriate to consider what the discipline would have been if all the charged misconduct during the time period had been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602.) Thus, "the aggravating force of prior discipline is generally diminished if the misconduct underlying it occurred during the same time period." (*Id.* at p. 619.)

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent committed multiple acts of misconduct, including failure to perform services competently; failure to deposit funds in a client trust account; failure to render an accounting; and failure to promptly pay client funds.

Mitigation

Good Character (Std. 1.2(e)(vi).)

Respondent presented testimony from three character witnesses, including one attorney and two former clients, testifying to respondent's character, competence, integrity, honesty, empathy, and efficiency. However, testimony by three character witnesses is not entitled to significant weight in mitigation since it is not an extraordinary demonstration of good character attested to by a wide range of references. (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153.)

Also, the mitigating weight given to his community service and pro bono activities is diminished since they were previously considered in his prior discipline.

Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal

profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards provide for the imposition of a minimum sanction ranging from reproval to suspension. (Standards 2.2(b) and 2.4(b).) Standard 1.6(a) states, in pertinent part, "If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding, and different sanctions are prescribed by these standards for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions."

Standard 1.7(a) provides that, when an attorney has one prior record of discipline, "the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust."

Standard 2.2(b) provides that commingling or another violation of rule 4-100 must result in at least a three-month actual suspension, irrespective of mitigating circumstances.

Standard 2.4(b) states that, "culpability of a member of wilfully failing to perform services in an individual matter or matters not demonstrating a pattern of misconduct or culpability of a member of failing to communicate with a client shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client."

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in talismanic fashion. As the final and independent

arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton, supra*, 36 Cal.4th at p. 92.)

The State Bar requested that respondent be actually suspended for 90 days, citing to the standards.

Respondent, on the other hand, argued that he is not culpable of any misconduct. And even if he is found culpable, he urged no additional discipline given that the misconduct involved here was contemporaneous with the misconduct in the prior case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602.)

As the court noted in its decision in his prior disciplinary matter, *Lester v. State Bar* (1976) 17 Cal.3d 547 was found to be instructive. There, the Supreme Court actually suspended an attorney for six months for failing to perform services in four matters, failing to refund any portion of advanced fees, failing to communicate with clients and with misrepresentation. Aggravation included his lack of candor before the State Bar and general lack of insight into the wrongfulness of his matters.

Here, the origin of respondent's misconduct lies not with dishonesty or intent, but rather with his carelessness and grossly negligent reliance on his office staff to the detriment of his clients. Nevertheless, the court considers "the totality of the findings in the two cases to determine what the disciplinary would have been had all the charged misconduct in this period been brought as one case." (*In the Matter of Sklar, supra,* 2 Cal. State Bar Ct. Rptr. 602, 619.) The misconduct found in the prior case and the current matter combined involved seven client matters and 16 counts, spanning from 2009 through 2012. Thus, respondent's misconduct is more serious and extensive than that of the misconduct found in *Lester*. Accordingly, ten

months' actual suspension and until he made restitution would have been appropriate had both cases been brought in as one case.

In view of respondent's misconduct, the case law, the aggravating and mitigating evidence, and the recommended six months' actual suspension in his previous disciplinary matter, the court concludes that placing respondent on an additional actual suspension of 120 days in the current matter would be appropriate to protect the public and to preserve public confidence in the profession. The imposition of the prior and current discipline may overlap, possibly resulting in less than 10 months' actual suspension. But the difference is de minimus.

Recommendations

It is recommended that respondent Kenneth Matthew Cooke, State Bar Number 159341, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that respondent be placed on probation[7] for a period of two years subject to the following conditions:

1. Respondent Kenneth Matthew Cooke is suspended from the practice of law for the first 120 days of probation;

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.

3. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar

[7] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

7. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

8. At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Exam

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme

Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: July _____, 2013

LUCY ARMENDARIZ
Judge of the State Bar Court